Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

PATRICIA ANN CAREY,

Petitioner,

v.

AMY OKUBO and
WILLIAM WOOD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNTIED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit affirmed the district court's determination that state actors were protected by absolute prosecutorial immunity or qualified immunity; or that there was no violation of a federally protected right in the execution, under oath of a verified motion for revocation of bond, within a criminal case which omitted certain exculpatory facts with respect to whether the chemical tests employed could create a reasonable inference of knowing and voluntary ingestion of cocaine by the Petitioner, even though the verified motion resulted in the issuance and execution of warrants for the arrest of Petitioner and Petitioner's spending 12 days in custody prior to the dismissal of the motions.

The Tenth Circuit opinion, while finding that the Respondents were acting in the capacity of witnesses when the verifications in question were executed, nonetheless found that they were entitled to absolute immunity. In so doing, it is appears that the panel distinguished *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 471 (1997) on the basis that *Kalina* dealt with an affirmative misstatement under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) and was therefore distinguishable from the omission of material exculpatory facts from a Fourth Amendment affidavit.

The following questions are presented:

1. Can an affiant receive absolute immunity for their false testimony in obtaining a warrant?

2. Does the doctrine announced in *Stewart v. Donges*, 915 F.2d 572, 583 (10th Cir. 1990), make material omissions from an affidavit filed in support of a warrant actionable under 42 U.S.C. § 1983?

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Tenth Circuit was not selected for publication, but was reported at 158 Fed. Appx. 962, 2005 U.S. App. Lexis 27668. Petitioner's petition for rehearing or rehearing en banc was denied by the Court on January 30, 2006. The Tenth Circuit affirmed the November 3, 2004 decision of the United States District Court for the District of Colorado which also was not selected for publication. *See* Appendices A-C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Tenth Circuit's opinion was rendered on December 15, 2005. The Appellant's Petition for Rehearing En Banc was denied on January 30, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code, Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Petitioner, Patricia Ann Carey, was released on bond on two underlying criminal charges in the Boulder County District Court, State of Colorado. One of the conditions of Ms. Carey's bond was that she not use any illegal drugs

2. At the time that Ms. Carey was on bond, Boulder County, in an effort to cut costs, contracted for the cheapest of drug tests available for preliminary screening. The director of the forensic laboratory performing the tests specifically informed Boulder County and the Boulder County District Attorney that the test results obtained were not of evidentiary value and could not be used judicially without further confirmatory testing.

3. Respondent Amy Okubo is a deputy district attorney for Boulder County, Colorado. Respondent William Wood was serving in the capacity of case manager for Boulder Community Justice Services at the time.

4. One of the screening tests performed on a sample provided by Ms. Carey as a condition of her bond came back positive for the presence of cocaine. Based solely on the preliminary test, respondent Wood requested that respondent Okubo file a verified Motion to Revoke Bond in each of the two pending criminal cases.

5. The motions to revoke were filed upon the verification, under oath, of respondent Okubo that the facts stated in the motions were true and correct.

6. The motions to revoke did not contain any information relating to the evidentiary value of the

preliminary screening tests, although respondent Okubo knew that the laboratory which performed the tests had specifically disclaimed any evidentiary value.

7. On the basis of the motions, as verified by respondent Okubo and respondent Wood, the Boulder County District Court issued a warrant for the arrest of Ms. Carey and set a hearing on the motions to revoke her bond.

8. Ms. Carey was arrested pursuant to the warrants and was in custody for twelve (12) days prior to the hearing on the motions to revoke. In addition, Ms. Carey was forced to expend more than $6,000 in defend against the motion.

9. At the hearing before the Boulder County District Court, it was revealed that subsequent tests failed to confirm the presence of drugs in Ms. Carey's system. As a result the motions to revoke were dismissed.

10. Respondents do not deny that they engaged in providing information, under oath, to the Boulder County District Court or that the court issued two arrest warrants pursuant to the information provided by respondents. Respondents do not deny that the court found the warrants and the information upon which they were based could not be sustained and dismissed the motions.

11. Ms. Carey brought an action for damages pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Colorado.

12. On a Motion to Dismiss filed by respondents (which was not converted to a Motion for Summary Judgment) the United States District Court for the District of Colorado ruled as follows:

I'm granting the motion to dismiss on three separate grounds. Number one, the plaintiff has not shown a violation of the Fourth and Fourteenth Amendments here by the affidavit in question, because it is my view that the use of the enzyme test that was used in this case to—as a basis for seeking the arrest warrant for the revocation of bond in this case is, you know, the use of that test makes the affidavit false in suggesting that the violation—there had been a violation of the conditions of release by the use of cocaine.

I just don't think that that's a violation of the Fourth Amendment. Accordingly, there is no Constitutional tort, and without a Constitutional tort, there obviously cannot be liability for it.

The second ground is that the defendants acting in their official roles, as they were in this case, have qualified immunity for liability for such a violation, because there is no clearly established law that says that this is a violation of the Constitution, or that their conduct in submitting the application with that affidavit would violate the Constitution.

The third is I believe that this is subject to absolute immunity. I don't think that the special circumstances that the Supreme Court relied on in the Kalena (sic) against Fletcher case are comparable to this case. In that case, there was, by the assistant district attorney in that case, false information provided. Now, it happened to be both omission and commission falsity, but the conduct

> of the defendant in that case is different from the conduct of the defendants in this case, so the case is not applicable in my opinion.

(Appendix B, Excerpts of Hearing Transcript of November 3, 2004, 15a-16a).

13. Ms. Carey appealed the dismissal of her action to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed the dismissal on December 15, 2005.

14. The Tenth Circuit opinion reasons:

> As set forth above, there is no question that Okubo vouched for the truth of the facts that were set forth in the verified motions to revoke bond, and we do not agree with defendants' argument that Colo. Rev. Stat. 5 16-4-107(4) requires that an application to revoke a bond must be verified by the district attorney. In addition, even if the statute could be construed to require such a result, we do not believe the absolute immunity analysis should turn on whether the controlling state law requires a prosecutor to provide a sworn verification. That said, we nonetheless conclude that *Kalina* is distinguishable, and that the district court correctly determined that Okubo is entitled to absolute prosecutorial immunity with regard to her conduct in presenting the lab report from Forensic Laboratories to the Boulder District Court.
>
> To begin with, as pointed out by defendants, unlike the situation in *Kalina*, there is no

> allegation here that the verified motions to revoke bond contained any false statements of fact. To the contrary, it is undisputed that the urine sample that Carey provided on June 30, 2004 tested positive for cocaine according to the lab report provided by Forensic Laboratories. *See* Aplt. App., Vol. 1 at 105; Vol. 2 at 239. We also reject Carey's argument that *Kalina* applies here because Okubo allegedly omitted material information from the verified motions concerning the scientific reliability of the EIA test procedure. Simply put, while Okubo did indeed vouch for the truth of the facts set forth in the verified motions, her statements did not vouch for the scientific reliability of the EIA test procedure. Instead, the scientific reliability of the EIA test procedure was an issue for the Boulder District Court to decide, and, in fact, the court subsequently decided the issue in favor of Carey when it denied the verified motions to revoke bond at the hearing that was held on July 26, 2004. Id., Vol. 1 at 76; Vol. 3 at 431-436. (Appendix A, Panel Opinion, pp. 12-13).

15. However, as previously noted, in contracting with Colorado's Twentieth Judicial District to do the test in question, the Supervising toxicologist of Forensic Laboratories, James Ruth, had specifically warned the district that the EIA results being provided were not of evidentiary quality (*See* Panel Opinion at p. 4). Thus, the information which was withheld from the affidavit was that, in the expert opinion of the toxicologist supervising the test, the test did not make it more probable than not that the Plaintiff had violated any condition of her bond or that metabolites of cocaine had actually been detected.

REASONS FOR GRANTING THE PETITION

The warrant clause of the Fourth Amendment, made applicable to the States by the Fourteenth Amendment provides ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . ." The question of whether the inclusion of false information or the omission of exculpatory information in connection with the determination of probable cause to issue a warrant for the arrest of a citizen is of Constitutional import.

The Tenth Circuit in this case found that the respondents had absolute immunity in spite of their failure to include exculpatory information concerning the reliability of tests upon which the affidavit was based. The Tenth Circuit's decision is in contradiction to this Court's holding in *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 471 (1997).

In *Kalina*, this Court held that absolute prosecutorial immunity will not lie for a prosecutor who is functioning as a fact witness in support of the issuance of a warrant. After noting that *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 109, 89 L. Ed. 2d 271 (1986) held that the affiant is not immune from suit, this Court explained:

> Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required "Oath or affirmation" is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.

> Finally, petitioner argues that denying her absolute immunity will have a "chilling effect" on prosecutors in the administration of justice.
>
> We are not persuaded.
>
> It may well be true that prosecutors in King County may abandon the practice of routinely attesting to the facts recited in a "Certification for Determination of Probable Cause" and pattern their procedures after those employed in other parts of the Nation. Petitioner presents no evidence that the administration of justice is harmed where the King County practice is not followed. In other respects, however, her argument addresses concerns that are not affected by our decision because we merely hold that §1983 may provide a remedy for respondent insofar as petitioner performed the function of a complaining witness. We do not depart from our prior cases that have recognized that the prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate. *See* [*Imbler v. Pachtman*, 424 U.S. 409, 431, 417, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)]; [*Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993)].

Kalina v. Fletcher, 522 U.S. 118, 130 (1997)

In *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d (1978), this Court stated:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search

> warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Franks dealt with a materially false statement, rather than an omission of material information. The Courts of Appeal have held that the reasoning of *Franks* protects against material omissions from affidavits.

In fact, the law of the Tenth Circuit is clearly established that the omission of materially exculpatory facts from an affidavit in support of an arrest warrant makes the affidavit materially false. In *Stewart v. Donges*, 915 F.2d 572, 582 (10th Cir. 1990), the Court stated

> Prior to the time of plaintiff's arrest in this case, the Tenth Circuit had not addressed whether the standards of *Franks* governed omissions as well as affirmative misstatements. n11 However, several of the other circuits had indicated that the "deliberate falsehood" and "reckless disregard" standards of *Franks* applied to material omissions, as well as affirmative falsehoods. n12 *See, e.g., United States v. Ippolito, 774 F.2d 1482, 1486-87 n.1 (9th Cir. 1985); Olson v. Tyler, 771 F.2d 277, 281 n.5 (7th Cir. 1985)* ("The *Franks* rationale applies with equal force where police officers secure a warrant through the intentional or reckless *omission* of material facts." (emphasis in original)); *United States v. Ferguson, 758 F.2d 843, 848* (2d Cir.) ("Omissions from an affidavit that are claimed to be material are governed by *[Franks v. Delaware]), cert. denied, 474 U.S. 841, 88 L. Ed. 2d 102, 106 S. Ct. 124 (1985); United States v. Williams, 737 F.2d 594 (7th Cir. 1984)* ("we acknowledge that the rationale of *Franks* applies to omissions") (cases cited), *cert. denied, 470 U.S. 1003, 105 S. Ct. 1354, 1355, 84 L. Ed. 2d 377 (1985); United States v. Johnson, 225 U.S. App. D.C. 33, 696 F.2d 115, 118 (D.C. Cir. 1982)* ("the reasoning of *Franks* 'logically extends . . . to material omissions'" (quoting 2 W. LaFave, *Search and Seizure* § 4.4 (Supp. 1982))); *West*

> *Point-Pepperell, Inc. v. Donovan, 689 F.2d 950, 959 (11th Cir. 1982); United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980)* ("allegations of material omissions [are] to be treated essentially similarly to claims of material misstatements"). Therefore, we hold that at the time defendant submitted his affidavit and arrested plaintiff, it was a clearly established violation of plaintiff's Fourth and Fourteenth Amendment rights to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause.

All United States Courts of Appeal have held that *Franks* protects against material omissions from affidavits:

United States v. Paradis, 802 F. 2d 533 (1st Cir. 1986)

Burke v. Town of Walpole, 405 F.3d 66, ¶ 72 (1st Cir. 2005)

Golino v. New Haven, 950 F.2d 864, 871 (2d Cir. 1991)

Cummings v. City of Philadelphia, 137 Fed.Appx. 504 § 21 (3d Cir. 2005)

United States v. Shorter, 328 F.3d 167 ¶ 26 (4th Cir. 2003)

United States v. Tomblin, 46 F.3d 1369 (5th Cir. 1995)

United States v. Bonds, 12 F.3d 540, (6th Cir. 1993).

United States v. Merritt, 361 F.3d 1005 (7th Cir. 2004)

United States v. Buchanan, 167 F.3d 1207 (8th Cir. 1999)

United States v. Hall, 113 F.3d 157, 159 (9th Cir. 1997).

Madiwale v. Savaiko, 117 F.3d 1321 ¶ 38-39 (11th Cir. 1997)

United States of America v. Alex O. Akinyemi, No. 93-3109 (DC CIR 1994)

In *DeLoach v. Bevers*, 922 F.2d 618 (C.A.10 (Okla.) 1990), the Tenth Circuit held:

> DeLoach alleged that Bevers violated her Fourth Amendment rights by causing her to be arrested pursuant to an intentionally false and misleading affidavit. Bevers contends that she is entitled to qualified immunity under the doctrine of *Malley v. Briggs, 475 U.S. 335, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986).* In *Malley*, qualified immunity in § 1983 actions was equated with the good-faith exception to the exclusionary rule laid down in *United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984). Malley, 475 U.S. at 344. Leon* reaffirmed the doctrine of *Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978)*, that a warrant must be voided "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Leon, 468 U.S. at 923.* Thus, "where the judicial finding of probable cause is based solely on information the officer knew to be false or would have known to be false had he not recklessly disregarded the truth, **not only does the arrest violate the fourth amendment, but the officer**

> **will not be entitled to good faith immunity [under § 1983]**." *Olson v. Tyler, 771 F.2d 277, 282 (7th Cir. 1985).* A reckless disregard for the truth exists when "the affiant 'in fact entertained serious doubts as to the truth of his' allegations, . . . [and] a factfinder may infer reckless disregard from circumstances evincing 'obvious reasons to doubt the veracity' of the allegations." *United States v. Williams, 737 F.2d 594, 602 [**12] (7th Cir. 1984)* (quoting *St. Amant v. Thompson, 390 U.S. 727, 731-32, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968)), cert. denied, 470 U.S. 1003, 105 S. Ct. 1354, 84 L. Ed. 2d 377 (1985).* The *Franks* rule applies to omissions as well as affirmative misstatements, if the omissions are so probative they would vitiate probable cause. *Stewart v. Donges, 915 F.2d 572, 582 n.13, 583 (10th Cir. 1990).* Recklessness may be inferred from omission of facts which are "clearly critical" to a finding of probable cause. *Hale v. Fish, 899 F.2d 390, 400 (5th Cir. 1990); United States v. Reivich, 793 F.2d 957, 961 (8th Cir. 1986).*

(emphasis added).

In a case involving the withholding of exculpatory evidence, the existence of probable cause is determined by examining the evidence "as if the omitted information had been included" and inquiring whether probable cause existed in light of all the evidence, [*Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996)] (quoting *Stewart v. Donges*, 915 F.2d 572, 582 n.13 (10th Cir.1990)). *See also Taylor*, 82 F.3d at 1562.

Pierce v. Gilchrist, 359 F.3d 1279, 1293 (C.A.10 (Okla.) 2004).

Thus, while the Tenth Circuit opinion in this case attempts to distinguish *Kalina* on the difference between the inclusion of affirmatively false statements and the omission of material facts which obviate probable cause, a long line of cases, have held that there is no distinction as both are violations of *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) and violations of the Fourth and Fourteenth Amendments to the United States Constitution.

The Tenth Circuit has willfully disregarded this Court's pronouncement in *Kalina v. Fletcher*, *supra*, and chose to abandon a long line of cases which firmly establish that the omission of material exculpatory facts from an affidavit or verified motion seeking an arrest warrant violate clearly established law, and are actionable under 42 U.S.C. § 1983.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED DECEMBER 14, 2005

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04-1516
(D.C. No. 04-M-1606 (PAC))
(D. Colo.)

PATRICIA ANN CAREY,

Plaintiff-Appellant,

v.

AMY OKUBO; WILLIAM WOOD,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before **TYMKOVICH, PORFILIO,** and **BALDOCK,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff-appellant Patricia Ann Carey is appealing the order entered by the district court dismissing her civil rights complaint under Fed. R. Civ. P. 12(b)(6). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

A. Introduction.

We review the district court's grant of a motion to dismiss de novo, accepting all well-pleaded facts as true and viewing them in the light most favorable to Carey. *See Sutton v. Utah State Sch. for Deaf & Blind,* 173 F.3d 1226, 1236 (10th Cir. 1999). Having conducted the required de novo review, we have concluded that the district court did not err in dismissing Carey's complaint for failure to state a claim upon which relief can be granted. We reach this conclusion based on our determination that the district court correctly determined that defendants are entitled to absolute prosecutorial immunity with regard to Carey's claim that they violated her Fourth Amendment rights.[1]

---

1. Because we have determined that defendants are entitled to absolute prosecutorial immunity, we do not need to address the issue of qualified immunity.

Appendix A

B. Carey's Complaint.

In her complaint, Carey alleged as follows:

2. Defendant Amy Okubo is a . . . Deputy District Attorney in [Boulder County, Colorado]. Although Amy Okubo has acted in a prosecutorial capacity with respect to the Plaintiff, liability is asserted herein for that portion of her participation as a witness under *Kalina v. Fletcher,* 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997). . . .

3. Defendant William Wood is . . . employed by Boulder County Community Services as a case manager providing pretrial supervision to persons charged in [Boulder County] with criminal offenses. . . . [T]he claims herein are based upon the conduct of William Wood in all aspects with regard to the preparation of the request for the two arrest warrants for alleged violation of bail bond conditions.

. . . .

5. On June 22, 2004, Plaintiff Patricia Carey was admitted to bail in Boulder County District Court case number 02CR1297 and 02CR1866 with a bond condition that Plaintiff not consume non-prescribed drugs while on bond. Pursuant to the conditions of said bail bonds, Plaintiff was subjected to the supervision of Boulder County Community Justice Services and assigned to William Wood.

6. Boulder County Community Justice Services and William Wood, [were] aware that the amino enzyme screening done to analyze the urine tests it was administering were not sufficiently reliable to be accepted for evidentiary purposes in judicial proceedings, and had been specifically told by James Ruth, Ph.D. that "You can't send People to prison on these test results without obtaining a confirmatory test by Gas Chromotography-Mass Spectrometry."

7. On June 30, 2004, Plaintiff provided a urine sample which ultimately tested potentially positive for metabolites of cocaine by screening amino-enzyme inventories, indicating the need to order confirmatory testing. Knowing that a confirmatory test was necessary to obtain any judicially admissible result, on July 13, 2004, William Wood prepared [ ] "Community Justice Services Noncompliance Report[s]" and submitted [them] to the District Attorney's office, requesting arrest warrants for a bond revocation. Although William Wood was aware that subsequent urine testing had come back below threshold and that the test used [was] not accepted in the scientific community as reliable to confirm the use of cocaine, the "Community Justice Services Noncompliance Report[s]" failed to remind the District Attorney that the test[ ] [was] not viewed as sufficiently reliable for use in evidence.

8. On July 13, 2004, Amy Okubo, acting as a witness, verified [identical] motion[s] to revoke the bail bond of Patricia Carey, in Boulder County District Court case number 02CR1297 and 02CR1866, testifying,

Appendix A

> The defendant is on bond for a class three felony Possession with Intent to Sell and Sale of a Schedule II Controlled Substance. As a condition of the defendant's bond she is to consume no drugs. On June 30, 2004, eight days after the defendant first appeared in custody at the Boulder County Jail, she tested positive for the presence of cocaine in a urine sample. Cocaine metabolites are not normally present in urine samples seventy-two hours (three days) after last usage. In this case the metabolites were present eight days later. See attached documentation from Community Justice Services.

Said verified motion[s] recklessly omitted the fact that . . . the test was not of evidentiary value. . . . The reckless omission of exculpatory facts from the verified motion[s] rendered the verified motion[s] constitutionally false under *Stewart v. Donges,* 915 F.2d 572, 583 (Tenth Cir. 1990).[2]

9. A arrest warrant[s] with no bond [were] issued on the verification[s] of Amy Okubo and Patricia Ann Carey was arrested on July 14, 2004. Patricia Ann Carey was held without bond until July 26, 2004, when the Verified Motion[s] to Revoke Bond [were] heard [and denied]

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2. Carey also alleged that the verified motions recklessly omitted other facts, but she is not pursuing those omission claims in this appeal.

by the district court.[3] Patricia Ann Carey was forced to incur $6,093.46 in defense charges, including $2,950.00 in expert witness fees and suffered loss of her liberty by spending twelve days in jail.

. . . .

13. William Wood and Amy Akubo sought an arrest warrant for the arrest of Patricia Ann Carey through the sworn testimony of Amy Okubo, which testimony was materially false, and omitted material exculpatory facts. Said conduct violated Patricia Carey's right, pursuant to the Fourth Amendment to the Constitution of the United States to be free from unreasonable arrest or seizure. . . .[4]

Aplt. App. Vol. 1 at 4-7.

C. District Court's Rulings.

The district court granted defendants' motion to dismiss at the conclusion of a hearing on the motion, ruling from the bench as follows with regard to the issue of absolute prosecutorial immunity:

---

3. At the conclusion of the hearing on July 26, 2004, the Boulder District Court denied the verified motions to revoke bond. The court denied the motions because Carey presented unrebutted expert testimony establishing that defendants were relying on an initial drug screening test that was not sufficiently reliable to confirm a positive cocaine test. *See* Aplt.App., Vol. 1 at 76; Vol. 3 at 431-36.

4. Carey also asserted a due process claim, but she has abandoned that claim for purposes of this appeal.

> And here is my ruling. I'm granting the motion to dismiss on three separate grounds.
>
> . . . .
>
> The third is I believe that this is subject to absolute [prosecutorial] immunity. I don't think the special circumstances that the Supreme Court relied on in the *Kal[i]na against Fletcher* case are comparable to this case. In that case, there was, by the assistant district attorney in that case, false information provided. Now, it happened to be both omission and commission falsity, but the conduct of the defendant in that case is different from the conduct of the defendants in this case, so the case is not applicable in my opinion.

Id., Vol. 3 at 478.

D. Undisputed Matters.

Before proceeding to analyze the merits of Carey's Fourth Amendment claim, we note that neither side disputes that: (1) Wood was acting as an agent of the Boulder County District Attorney's office in his capacity as a pretrial case manager; (2) Wood was performing a prosecutorial function when he submitted the noncompliance reports to the Boulder County District Attorney's office and recommended that Carey be arrested and taken into custody for violating her bond conditions; and (3) Wood's alleged knowledge of what Dr. James Ruth allegedly said about the test procedures at issue here is imputed to the Boulder County District Attorney's office and, more specifically, to Deputy District

Attorney Okubo. We will therefore analyze the absolute immunity issue within this framework.

II.

A. Defendant Okubo's Verified Motions.

As set forth in Carey's complaint, defendant Okubo signed the "Verification" for the two verified motions to revoke bond that she submitted to the Boulder District Court. Specifically, Okubo "[swore] and affirm[ed] that the [facts set forth in the motions were] true and accurate to the best of [her] information and belief." Aplt.App., Vol. 1 at 101; Vol. 2 at 235. The facts sworn to included the following:

> On June 30, 2004, eight days after the defendant first appeared in custody at the Boulder County Jail, she tested positive for the presence of cocaine in a urine sample. Cocaine metabolites are not normally present in urine samples seventy-two hours (three days) after last usage. In this case the metabolites were present eight days later. See attached documentation from Community Justice Services.

Id.

The "FINAL REPORT" from Forensic Laboratories was among the documents that were attached to the verified motions, and the report stated that "Cocaine SQ" was detected by "POSITIVE CONFIRMATORY SCREEN BY EIA." *Id.*, Vol. 1 at 105; *see also id.*, Vol. 2 at 239. As set forth in

defendants' brief, the acronym "EIA" refers to a specific type of drug test known as the "enzyme immunoassay test." Aplee. Br. at 1. In her complaint, Carey refers to this test as "amino enzyme screening," Aplt.App., Vol. 1 at 5, ¶ 6, and we will refer to it herein as the "EIA test" to avoid confusion.

B. Absolute Prosecutorial Immunity.

Colo. Rev. Stat. § 16-4-107(4) provides as follows:

> Upon verified application by the district attorney stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of a bond, the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application.

Defendants claim that this statute requires that an application to revoke a bond must be verified by the district attorney, as opposed to some other "fact witness," and that this statutory requirement distinguishes the situation in this case from the situation in *Kalina v. Fletcher,* 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997). *See* Aplee. Br. at 16-17; *Kalina,* 522 U.S. at 129, 118 S.Ct. 502 ("Although [Washington] law required that [an affidavit in support of an arrest warrant must] be sworn or certified under penalty of perjury, neither federal nor state law made it necessary for the prosecutor to make that certification."). Defendants also claim that this case is distinguishable from *Kalina* because, unlike the situation in *Kalina,* the sworn verifications at issue

in this case do not contain any false statements of fact. *See* Aplee. Br. at 9.

In *Kalina,* the Supreme Court addressed "[t]he question [of] whether 42 U.S.C. § 1983 creates a damages remedy against a prosecutor for making false statements of fact in an affidavit supporting an application for an arrest warrant, or whether . . . such conduct is protected by 'the doctrine of absolute prosecutorial immunity.' " *Kalina,* 522 U.S. at 120, 118 S.Ct. 502. In addressing this issue, the Court began its analysis by pointing out that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Id.* at 126, 118 S.Ct. 502 (quotation omitted). The Court also noted, however, that "the defense [of absolute immunity is not available] when the prosecutor was performing a different function." *Id.* "Thus, in determining [absolute] immunity, [a court must] examine the nature of the function performed, not the identity of the actor who performed it." *Id.* at 127, 118 S.Ct. 502 (quotation omitted).

Applying these principles, the Court then analyzed the absolute immunity issue in *Kalina* as follows:

> [P]etitioner argues that the execution of the [certification for determination of probable cause] was just one incident in a presentation that, viewed as a whole, was the work of an advocate and was integral to the initiation of the prosecution. That characterization is appropriate for her drafting of the certification, her determination that the

> evidence was sufficiently strong to justify a probable-cause finding, her decision to file charges, and her presentation of the information and the motion to the court. Each of those matters involved the exercise of professional judgment. . . . But that judgment could not affect the truth or falsity of the factual statements themselves. Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required "Oath or affirmation" is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.
>
> . . . .
>
> [W]e . . . hold that § 1983 may provide a remedy for respondent insofar as petitioner performed the function of a complaining witness. We do not depart from our prior cases that have recognized that the prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate.

Id. at 130-31, 118 S.Ct. 502. The Court therefore agreed with the district court and the Ninth Circuit that the prosecutor in *Kalina* "was not entitled to absolute immunity." *Id.* at 122, 118 S.Ct. 502.

Appendix A

As set forth above, there is no question that Okubo vouched for the truth of the facts that were set forth in the verified motions to revoke bond, and we do not agree with defendants' argument that Colo. Rev. Stat. § 16-4- 107(4) requires that an application to revoke a bond must be verified by the district attorney. In addition, even if the statute could be construed to require such a result, we do not believe the absolute immunity analysis should turn on whether the controlling state law requires a prosecutor to provide a sworn verification. That said, we nonetheless conclude that *Kalina* is distinguishable, and that the district court correctly determined that Okubo is entitled to absolute prosecutorial immunity with regard to her conduct in presenting the lab report from Forensic Laboratories to the Boulder District Court.

To begin with, as pointed out by defendants, unlike the situation in *Kalina,* there is no allegation here that the verified motions to revoke bond contained any false statements of fact. To the contrary, it is undisputed that the urine sample that Carey provided on June 30, 2004 tested positive for cocaine according to the lab report provided by Forensic Laboratories. *See* Aplt.App., Vol. 1 at 105; Vol. 2 at 239. We also reject Carey's argument that *Kalina* applies here because Okubo allegedly omitted material information from the verified motions concerning the scientific reliability of the EIA test procedure. Simply put, while Okubo did indeed vouch for the truth of the facts set forth in the verified motions, her statements did not vouch for the scientific reliability of the EIA test procedure. Instead, the scientific reliability of the EIA test procedure was an issue for the Boulder District Court to decide, and, in fact, the court

subsequently decided the issue in favor of Carey when it denied the verified motions to revoke bond at the hearing that was held on July 26, 2004. *Id.*, Vol. 1 at 76; Vol. 3 at 431-436.

Finally, because he did not personally vouch for the truth of any of the factual matters that were set forth in the noncompliance reports, *id.*, Vol. 1 at 103; Vol. 2 at 237, and because it is undisputed that he was performing a prosecutorial function, we also conclude that the district court correctly determined that Wood is entitled to absolute prosecutorial immunity for his conduct in this case.

The judgment of the district court is AFFIRMED. The parties' requests for oral argument are DENIED.

Entered for the Court

s/ Bobby R. Baldock
Bobby R. Baldock
Circuit Judge

APPENDIX B — JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED NOVEMBER 5, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 04-M-1606

PATRICIA ANN CAREY,

Plaintiff,

v.

AMY OKUBO and WILLIAM WOOD,

Defendants.

JUDGMENT

Pursuant to the order for dismissal with prejudice, entered by Senior District Judge Richard P. Matsch on November 3, 2004, it is

ORDERED AND ADJUDGED that the complaint and this cival action are dismissed with prejudice.

DATED: November 5, 2004.

BY THE COURT:

s/_____
Richard P. Matsch,
Senior District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

04-M-1606

PATRICIA ANN CAREY,

Plaintiff,

vs.

AMY OKUBO, et al.,

Defendants.

November 3, 2004

EXCERPTS OF HEARING - MOTION TO
DISMISS AND SANCTIONS
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U. S. District Judge for the District of Colorado, beginning at 2:00 p.m. on the 3rd day of November, 2004 in Courtroom A, United States Courthouse, Denver, Colorado.

* * *

[17] THE COURT: And, here is my ruling. I'm granting the motion to dismiss on three separate grounds. Number one, the plaintiff has not shown a violation of the Fourth and Fourteenth Amendments here by the affidavit in question,

because it is my view that the use of the enzyme test that was used in this case to—as a basis for seeking the arrest warrant for the revocation of bond in this case is, you know, the use of that test makes the affidavit false in suggesting that the violation—there had been a violation of the [18] conditions of release by the use of cocaine.

I just don't think that that's a violation of the Fourth Amendment. Accordingly, there is no Constitutional tort, and without a Constitutional tort, there obviously cannot be liability for it.

The second ground is that the defendants acting in their official roles, as they were in this case, have qualified immunity for liability for such a violation, because there is no clearly established law that says that this is a violation of the Constitution, or that their conduct in submitting the application with that affidavit would violate the Constitution.

The third is I believe that this is subject to absolute immunity. I don't think that the special circumstances that the Supreme Court relied on in the *Kalena against Fletcher* case are comparable to this case. In that case, there was, by the assistant district attorney in that case, false information provided. Now, it happened to be both omission and commission falsity, but the conduct of the defendant in that case is different from the conduct of the defendants in this case, so the case is not applicable in my opinion.

With respect to the question of the applicability of Rule 11 for sanctions in the case, you know, what Rule 11 says is that the Court has to look at whether there's a non-[19]

frivolous argument here for extension, modification, reversal of existing law, or the establishment of new law. In this case, I don't believe that the complaint violates Rule 11.

Now, the question of improper motivation is not really a Rule 11 issue. For purposes of my jurisdiction and my ruling, I accept the statement of the plaintiff's counsel as a member of the bar of this court, an officer of this court, that his drafting and filing of the complaint in this case was not motivated by an improper purpose. If that is to be pursued, it would have to be in a different forum, and it would have to be in terms, I think, of a violation of the Code of Professional Responsibility, which I don't—which is not before me.

So, I'm granting the motion to dismiss, The complaint and civil action are dismissed with prejudice. I don't know if you have any statutory costs in the case. I don't know that you do.

* * * *

APPENDIX C — ORDER IN THE UNITED STATES COURT OR APPEALS FOR THE TENTH CIRCUIT FILED JANUARY 30, 2006

UNITED STATES COURT OR APPEALS FOR THE TENTH CIRCUIT

No. 04-1516

PATRICIA ANN CAREY,

Plaintiff-Appellant,

v.

AMY OKUBO; WILLIAM WOOD,

Defendants-Appellees.

ORDER

Before TYMKOVICH, PORFILIO, and BALDOCK, Circuit Judges

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

s/
by:
Deputy Clerk

Supreme Court U.S.
FILED
JUN 5 2006
OFFICE OF THE CLERK

No. 05-1394

In The
Supreme Court of the United States

PATRICIA ANN CAREY,

Petitioner,

v.

AMY OKUBO and WILLIAM WOOD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner Patricia Ann Carey is a convicted felon serving concurrent sentences for drug possession and distribution. Ms. Carey was first arrested in Boulder County, Colorado, on July 24, 2002, and charged with drug possession and intent to sell. While awaiting trial, she was released on bond under the condition that she not consume non-prescribed drugs. She was required to undergo substance abuse monitoring to demonstrate her compliance with this bond condition.

Ms. Carey tested positive for cocaine use on August 6, 9, and 29, 2002. She also failed to appear for a urine test on September 2, 2002. On October 23, 2002, Ms. Carey was arrested in a second case, again based on drug possession and distribution charges, and she was once again released on bond. While on pre-trial bond, Ms. Carey tested positive for cocaine use on November 19, December 1, and December 9, 2002. She also failed to appear for scheduled urine tests on November 29, December 8, and December 15, 2002. Based on these bond condition violations, a Boulder County Judge issued warrants for her arrest.

On June 22, 2004, Ms. Carey was arrested on the outstanding warrants. She was released from custody with pre-trial bond conditions, including that she not consume non-prescribed drugs and that she submit to substance abuse monitoring. On June 30, 2004, an Enzyme Immunoassay ("EIA") test showed the presence of cocaine in Ms. Carey's urine. Based on the test results, Respondent William Wood, performing his duties as a bond case manager, requested that the District Attorney file a motion to revoke Ms. Carey's bonds. Respondent Deputy

District Attorney Amy Okubo reviewed the test results and prepared motions to revoke the bonds.

Boulder County District Court Judge Glowinsky reviewed Ms. Okubo's motions and issued arrest warrants for Ms. Carey, who was arrested on July 13, 2004. After a July 26, 2004, hearing on the motions to revoke bond, Judge Glowinsky found that the People had not met their burden of proving a bond violation and denied the motions to revoke bond.[1] Ms. Carey was released on bond following the hearing.

The next day, Ms. Carey tested positive for cocaine. The test result was confirmed by an EIA test and by a Gas Chromatograph Mass Spectrometry ("GC-MS") test. On August 9, 2004, Boulder County District Court Judge Glowinsky revoked Ms. Carey's bond and approved warrants for her arrest. In late August, 2004, Ms. Carey was arrested on federal drug charges. Ms. Carey was later convicted in all three cases and sentenced to prison.

---

[1] Ms. Carey's Petition for a Writ of Certiorari ("Petition") contains a misstatement because it incorrectly indicates that "[a]t the hearing before the Boulder County District Court, it was revealed that subsequent tests failed to confirm the presence of drugs in Ms. Carey's system. As a result the motions to revoke bonds were dismissed". Petition at 4. The Boulder County District Court Judge did not make her ruling based upon any "subsequent tests". Judge Glowinsky found that the People had not met their burden of proving a bond violation following a hearing in which Ms. Carey presented expert testimony without notifying the District Attorney in advance. At the hearing, Ms. Carey's expert testified that the June 30, 2004 urine sample should have been tested by a Gas Chromatograph Mass Spectrometry test. A subsequent GC-MS test of the June 30, 2004 urine sample confirmed the presence of cocaine at a higher level than the EIA test.

Ms. Carey filed a 42 U.S.C. § 1983 action against Ms. Okubo and Mr. Wood. The federal district court dismissed the lawsuit, finding that Ms. Carey failed to state a constitutional tort in her complaint and that Ms. Okubo and Mr. Wood were entitled to qualified immunity and absolute prosecutorial immunity. The Tenth Circuit affirmed, holding that Ms. Okubo and Mr. Wood were entitled to absolute prosecutorial immunity.

REASONS THE PETITION SHOULD BE DENIED

This case involves the routine application of established United States Supreme Court precedent by the district and circuit courts. Because the Court has adequately addressed absolute prosecutorial immunity in the context of arrest warrants in prior cases, the lower courts simply applied the law to the facts. The district court and the Tenth Circuit considered *Kalina v. Fletcher*, 522 U.S. 118 (1997) in their absolute immunity analyses, but determined that *Kalina* was not applicable because this case did not involve a misrepresentation or material omission by Ms. Okubo. Specifically, the Tenth Circuit found that, "unlike the situation in *Kalina*, there [was] no allegation that the verified motions to revoke bond contained any false statements of fact. To the contrary, it is undisputed that the urine sample that Carey provided on June 30, 2004 tested positive for cocaine according to the lab report . . . ". Petition at 12a. Thus, this case is another in a long series of circuit court cases properly interpreting *Kalina*, and the Petition should be denied. Furthermore, Ms. Carey's claim would have been dismissed even if the Court did not find absolute prosecutorial immunity.

I. THE TENTH CIRCUIT'S FACT-BASED INQUIRY DEMONSTRATES THAT CERTIORARI IS NEITHER APPROPRIATE NOR NECESSARY

This Court has determined that absolute immunity is not available to a prosecutor who, while performing in the role of a fact witness, makes false statement of fact. *Kalina,* 522 U.S. at 120. The Tenth Circuit has interpreted the *Kalina* exception to absolute immunity to include situations where a prosecutor "knowingly or recklessly omit[s] from an arrest affidavit information, which, if included, would have vitiated probable cause". *Stewart v. Donges*, 915 F.2d 572, 582 (10th Cir. 1990). Because the precedent in this area of the law is established, the Tenth Circuit performed a fact-based inquiry to reach its decision.

In deciding this case, the Tenth Circuit analyzed Ms. Okubo and Mr. Wood's absolute immunity in the context of *Kalina,* but found that "while Okubo did indeed vouch for the truth of the facts set forth in the verified motions, her statements did not vouch for the scientific reliability of the EIA test procedure. Instead, the scientific reliability of the EIA test procedure was an issue for the Boulder District Court to decide, . . . " Petition at 12a. Thus, the circuit court concluded that, "unlike the situation in *Kalina*, there [was] no allegation that the verified motions to revoke bond contained any false statements of fact . . . " nor did Ms. Okubo "omit[] material information from the verified motions . . . ". Id. The Tenth Circuit also properly determined that Mr. Wood was entitled to prosecutorial immunity "because he did not personally vouch for the truth of any of the factual matters that were set forth in the noncompliance reports . . . and it [was] undisputed that he was performing a prosecutorial function . . . ". Id. at 13a.

Thus, the Tenth Circuit properly considered and distinguished *Kalina* in reaching its decision.

II. MS. CAREY'S CLAIM WOULD HAVE BEEN DISMISSED EVEN IF THE COURT DID NOT FIND ABSOLUTE PROSECUTORIAL IMMUNITY

Ms. Okubo and Mr. Wood are entitled to qualified immunity because there is no clearly established law that a positive test result for cocaine in an EIA test is an insufficient basis for a bond revocation motion. An unpublished Tenth Circuit case shows that Ms. Okubo and Mr. Wood's actions satisfy due process. In *Easter v. Saffle*, 51 Fed.Appx. 286, 289, 2002 WL 31528687 (10th Cir. 2002), the Tenth Circuit found that "[a] *single* urinalysis amounts to 'some evidence' and thus satisfies due process". (emphasis in original). *See also Koening v. Vannelli*, 971 F.2d 422 (9th Cir. 1992) (holding that subsequent GC-MS test not required to satisfy due process).

Qualified immunity is appropriate because EIA test results are routinely accepted as evidence. A California appellate court has stated that the "EMIT (enzyme immunoassay test) use(s) the well-accepted immunoassay scientific technique to detect drugs in urine" and that "jurisdictions including the Ninth Circuit of Appeals have accepted its validity for almost a decade". *People v. Nolan*, 95 Cal.App.4th 1210, 1215 (2002). Similarly, the District of Columbia Court of Appeals has stated that "EMIT test results are presumptively reliable and thus generally admissible into evidence in every case". *Jones v. United States*, 548 A.2d 35, 46 (D.C.Ct.App.1988).

As these cases demonstrate, a reversal by this Court would simply result in a dismissal on qualified immunity grounds upon remand.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 05-1394

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PATRICIA ANN CAREY,

Petitioner,

v.

AMY OKUBO and WILLIAM WOOD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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STATEMENT OF THE CASE

The Respondents' Brief in Opposition to Petition for a Writ of Certiorari contains a statement of facts that begins with the assertion that "Petitioner Patricia Ann Carey is a convicted felon serving concurrent sentences for drug possession and distribution."

The Respondents then proceed to recite a number of times that Ms. Carey allegedly tested positive for cocaine use while she was on bond waiting trial on charges of possession and intent to sell. The Respondents conclude their recitation in their Statement of Facts: "In late August, 2004, Ms. Carey was arrested on federal drug charges. Ms. Carey was later convicted in all three cases and sentenced to prison."

The fact that Ms. Carey is a convicted felon is totally irrelevant to the issues raised in the Petition for Certiorari. Regardless of her subsequent conviction, Ms. Carey had and still has all of her Constitutional rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution.

The fact that Ms. Carey may have tested positive for cocaine previous to or subsequent to the incident that is the basis for the case and the Petition is also completely irrelevant to the issues raised in the Petition.[1]

The only rationale for the Statement of the Case presented by Respondent is to paint Ms. Carey in the worst

---

1. The GCMS test that Respondents allege confirmed Ms. Carey's use of cocaine on June 30, 2004, while above the laboratory cutoff, was determined by Respondents' own toxicologist to be far below the amounts that would have indicated the user would have felt any pharmacological effect and were within the range for the absorption through the skin of minute amounts spilled in the environment.

light possible before this Court; and not so subtly to suggest to this Court that she is not entitled to the protections to be free of unreasonable seizure of her person pursuant to the Fourth and Fourteenth Amendments. Ms. Carey's drug use or convictions have no bearing on whether the Respondents had the right to issue an arrest affidavit that knowingly omitted facts that were exculpatory to Ms. Carey.

REASONS THE PETITION SHOULD BE GRANTED

While the Tenth Circuit analyzed the issue of Respondents' absolute immunity it failed to apply its own decision in *Stewart v. Donges*, 915 F.2d 572, 582 (10th Cir. 1990). In *Stewart* the Tenth Circuit stated that situations where a prosecutor "knowingly or recklessly omits from an arrest affidavit information, which, if included, would have vitiated probable cause" were subject to the exception to absolute immunity as determined by this Court in *Kalina v. Fletcher*, 522 U.S. 118 (1997).

The Tenth Circuit in analyzing the facts in this case found that the Respondents were entitled to absolute immunity in performing their prosecutorial functions because they were not vouching for the scientific reliability of the test procedure used to determine that Ms. Carey had used cocaine on or about June 22, 2004.

What the Tenth Circuit failed to include in its analysis is the fact that the toxicologist who performed the EIA test specifically informed the Respondents that the EIA was not reliable and could not be used for evidentiary purposes. Thus the arrest affidavit was based on information that Respondents knew was not to be used as evidence of the alleged bond violation. This information, if it had been included in the arrest affidavit "would have vitiated probable cause."

Respondents' arguments all ignore the material fact that they **knew** at the time that they filed the noncompliance report and arrest affidavit that their own toxicologist had determined the EIA test was not **evidence** of cocaine use. Even if the EIA test is accepted as evidence in other jurisdictions, Respondents were in possession of information that the EIA test was not sufficiently reliable to be used as evidence in Ms. Carey's case.[2]

Respondents' citation to *Easter v. Saffle*, 51 Fed. Appx. 286, 2002 WL 3152867 (10th Cir. 2002) and *Koening v. Vannelli*, 971 F.2d 422 (9th Cir 1992) are inapposite to the issues presented in this case because both of them involve the substantive and procedural due process rights of prisoners in disciplinary actions.

This Court has held that prisoners do not have all of the due process rights that are available to defendants in criminal cases:

> Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." *Price v. Johnston, 334 U.S. 266, 285 (1948)* . . .
>
> Viewed in this light it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.

Wolff, Warden, et al. v. McDonnell, 418 U.S. 359, 555, 560, 94 S. Ct. 2963, 41 L. Ed. 935 (1974).

---

2. Respondents' Opposition Brief refers to the Enzyme Immuno-assay test "EIA" when referring to the test on which the arrest affidavit was based and "EMIT" tests when referring to the acceptance of the tests as evidence. It is not clear that the two tests are the same or equivalent.

Thus it is possible for a single urinalysis to be sufficient to satisfy the due process rights of a prisoner in a disciplinary hearing because the standard is only "some evidence" not the preponderance of evidence or evidence beyond a reasonable doubt applied in criminal procedures.

In addition, the *Easter* case is an unpublished opinion of the Tenth Circuit. Pursuant to 10th Cir. R. 36.3 an unpublished opinion may be cited only under limited circumstances:

Cir. R. 36.3. Citation of unpublished opinions/orders and judgments

> (A) Not precedent. Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel.
>
> (B) Reference. Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if
>
> (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and
>
> (2) it would assist the court in its disposition.
>
> (C) Attach copy. A copy of an unpublished decision must be attached to any document that cites it. If an unpublished decision is cited at oral argument, the citing party must provide a copy to the court and the other parties.

Respondents have not shown that they have met the requirements of 10th Cir. R. 36.3 for citation of the unpublished opinion of *Easter.*

Respondents' citation to *People v. Nolan*, 95 Cal. App. 4th 1210 (2002) and *Jones v. United States*, 548 A.2d 35 (D.C. Ct. App. 1998) is an attempt to mislead this Court with respect to the issues in this case. Even if it were true that immunoassay tests were accepted in every other court in the nation, in this case Respondents were specifically informed by the toxicologist that the tests were not reliable and should not be used as evidence in any criminal matter. Respondents deliberately failed to provide this information to the court issuing the arrest warrant.

CONCLUSION

Petitioner respectfully incorporates the facts and authorities as set for in her Petition for a Writ of Certiorari herein and submits that in light of the facts of this case this Court should grant the petition.

Respectfully submitted,

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